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Supreme Court, U.S.
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No.

In the

Supreme Court of the United States

Robert A. Heghmann,
Petitioner,

v.

Timothy F. Geithner, Secretary,
Department of the Treasury,
and **Ben S. Bernanke**, Chairman,
Federal Reserve System,
Respondents.

Petition for a Writ of Certiorari
to the
United States Court of Appeals
for the Second Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Does the disbursement of funds borrowed under Art. I, Sec. 8, cl.2 to pay for expenses under Art. I, Sec. 8, cl.1 authorized under the Federal Budget for Fiscal Years 2010 and 2011 executed by the Respondents violate the United States Constitution?

COR PORATE DISCLOSURE STATEMENT

There are no corporate individuals involved in this litigation.

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PRELIMINARY STATEMENT

In 1985 the Senate Judiciary Committee held hearings on the adoption of a Balanced Budget Amendment. After extensive hearings the Committee issued a report titled Senate Balanced Budget-Tax Limitation Constitutional Amendment, Senate Report, 99th Congress, 1st Session, No. 99 -162 (October 21, 1985) (hereinafter "Senate 99 - 162"). That Report states as follows:

> No concept is more a part of traditional American fiscal policy than that of a balanced budget. Throughout most of the nation's history, the requirement of budget balancing under normal economic circumstances was considered part of our "unwritten constitution". *Id.* at 21

The Senate Judiciary Committee was absolutely correct. The requirement of a balanced budget is not written but not because it is not in the Constitution. The requirement that spending under Article I, Sec. 8, cl. 1 (hereinafter "cl. 1") be balanced is structural.

There are no "oops" in the Constitution. Anyone familiar with the Records of the Federal Convention of 1787, the debates, the work of the Committee on Detail and the Committee on Style knows that every word, every phrase and punctuation mark was debated until the Delegates were satisfied the Constitution reflected as nearly as

possible their intent. There was a reason why the Borrowing power under Article I, Sec. 8, cl. 2 (hereinafter "cl. 2") was separate from the Tax and Spend Power under cl. 1 and why there is no spending provision in cl. 2. For 220 years, 110 Congresses and 43 Presidents the Congress sought to balance spending under cl. 1, therefore, it was never necessary for the courts to define the relationship between spending and borrowing – until now. For the first time in the Nation's history the President and the 111th Congress have ignored the separation between borrowing under cl. 2 and spending under cl. 1 and the safeguard built into the Constitution by the Framers and the People who ratified the Constitution is being ignored. As a result, the Nation is being plunged into bankruptcy.

PREVIOUS OPINIONS

The Petitioner originally filed an Original Petition in this Court in November, 2009. The Clerk of the Court returned the Original Petition stating that the Court was not accepting Original Petitions. The Petitioner then filed his complaint in the United States District Court for the Southern District of New York in January, 2010 along with a prepared summons for each of the Respondents. The complaint was filed but the summons was not returned and the Respondents were never served. On March 22, 2010 Chief Judge Loretta Preska issued an Order dismissing the complaint *sua sponte*. The opinion of the District Court is not reported and is reprinted in the Appendix to the Petition ("Pet. App.") at 3. The

Petitioner took a timely appeal by filing a Notice of Appeal in the Second Circuit and paying the fee. At that point the Petitioner again attempted to move the case to this Court by filing a Petition for Certiorari to the Second Circuit under Rule 11 and an Application to Proceed in *Forma Pauperis*. That Petition and Application was docketed in this Court as 09-10916. This Court denied the Application to Proceed in f*orma pauperis* and the Petitioner, unable to pay for printed briefs, did not prosecute the Petition and it was dismissed. The Petitioner then perfected the appeal to the Second Circuit. On October 28, 2010 the Circuit Court affirmed the dismissal but on entirely different grounds than the district court. The Opinion of the Court of Appeals is not reported and is reprinted in the Pet. App. at 1.

JURISDICTION

This Court has jurisdiction under 28 U.S.C. Sec. 1254 (1) and Rule 10 of this Court.

CONSTITUTIONAL PROVISIONS INVOLVED

Article I, Sec. 8, cl. 1 provides:

> The Congress shall have the power to Lay and collect Taxes, Duties, Imposts and Excises, to pay the Debts and provide for the common Defense and general Welfare of the United States; but all Duties, Imports and Excises

> shall be uniform throughout the United States.

Article I, Sec. 8, cl. 2 provides:

> To borrow Money on the credit of the United States.

First Amendment to the Constitution which provides:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

I. STATEMENT OF THE CASE

The Petitioner is a citizen of the United States. Timothy F. Geithner is the Secretary, Department of the Treasury. Ben S. Bernanke is the Chairman of the Federal Reserve.

The First Congress inherited a large debt to the French and the Dutch reflecting borrowing during the Revolutionary War. That Congress, which included many of the Delegates who had drafted the

Constitution, made retirement of the Debt the top priority of the New Government. That Debt was retired by 1845. From 1789 until the Fiscal Year (hereinafter "FY") 2009 budget, spending under cl. 1 was balanced against income. The Federal Surplus/Deficit for cl. 1 spending as a percentage of Gross Domestic Product (hereinafter GDP) remained relatively constant at plus or minus 1%.

Prior to the Budget for FY 2010, borrowing under cl. 2 has been limited to National Defense, ie. actually waging war, spending to re-arm to avoid war or economic crisis. Examples of cl. 2 borrowing included the Louisiana Purchase, the Civil War, World War I, the Great Depression, World War II, the build up of the U.S. military under President Reagan, the first Iraq war, the Afghan invasion and the second Iraq war. Since the end of World War II, borrowing under cl.2 was in the form of Supplemental Appropriations. In those budgets cl. 1 spending and income were balanced.

In the FY 2009 Budget cl. 1 spending was balanced against income however once again Supplemental Appropriations to pay for the continuing wars in Iraq and Afghanistan created an overall deficit in the $400 Billion range. Then came the collapse of Fannie May and Freddie Mac and the ensuing world wide banking crisis. Due to the financial collapse, the Administrations of President Bush and President Obama passed emergency spending legislation, the Tarnished Assets Relief Program, Pub. L. 110-343, 122 Stat. 3765 (Dec. 13,

2008) (hereinafter "T.A.R.P.") and the American Recovery and Reinvestment Act, Pub. L. 111 – 5 (2009) (hereinafter "A.R.R.A.") using funds borrowed under cl. 2.. Neither of these appropriations are challenged in this case. These emergency spending bills combined with the Supplemental Appropriations for the Iraq and Afghan wars pushed the Federal Deficit to $1.3 Trillion or 12.93% of GDP.

The Petitioner's complaint begins with the Federal Budget for FY 2010 in which the Obama Administration and the 111th Congress adopted a budget for cl.1 which relied on funds borrowed under cl. 2 for 39.1% of domestic spending resulting in a deficit of $1.3 Trillion (11.2% of GDP). The Federal Budget for FY 2010 does not reflect funding for the wars in Iraq or Afghanistan. Once again these wars were financed through Supplemental Appropriations.

Since the funds raised by borrowing under cl. 2 and spent under cl. 1 reflect an increase in federal programs and employees who will remain on the Budget for years to come, the need to borrow under cl. 2 to support spending under cl. 1 will continue with catastrophic results for the Nation. According to the Congressional Budget Office (hereinafter "C.B.O."), Federal Deficits as a percentage of GDP will remain in the 3% to 4% range through at least 1019.

More ominously, the Federal Debt as a percentage of GDP held by the public (including foreign nations) which is currently under 50% will increase to 90% of GDP by 2012 and 200% of GDP by

FY 2072 (it could reach that level as early as 2037). The impact of higher and higher interest being paid to borrow the money will require either huge increases in taxation or a steep decline in the value of the dollar – or both. Despite this the Obama Administration rather than cutting back cl. 1 spending continues to add new government programs requiring even more spending based upon funds borrowed under cl. 2. The C.B.O. projects that spending during FY 2011 will produce another deficit in cl. 1 spending in the $1.3 Trillion dollar range.

II. ARGUMENT

1. Borrowing under cl. 2 to fund Spending under cl. 1 is Unconstitutional.

A. The People Would Never have Ratified a Constitution Permitting Borrowed Funds to be Spent on the Common Defense and General Welfare.

If we are to understand the Liberty interests that the People intended to be protected in the Constitution, we must seek insights into their values and beliefs. The importance of this was attested to by no less than Madison himself. After the ratification of the Constitution some came to him and asked him to publish his notes so they could better understand the Constitution. Madison rebuffed them saying look not to the meaning in the minds of the Framers but in the minds of those who ratified it. *Records of the Federal Convention of 1787*, 3 Vols., Max Farrand, ed., Oxford University Press, New Haven & London

(1966) Vol III at 518. (hereinafter "Farrand") Since this case involves borrowing and debt, we must begin our analysis with the views of the People on those subjects. We begin our search for the expectations of the People in the writings available to them at the time the Constitution was ratified.

(a) The Bible

To suggest that the Framers in drafting the Constitution and the People in deciding whether or not to ratify the Constitution did not draw upon the Bible is simply absurd. For those Americans the Bible was their guide, their North Star. During the ratification debates references were made to the Bible by those for and against ratification. *The Debates in the several State Conventions on the Adoption of the Federal Constitution,* 5 Vols., Jonathan Elliot, ed., Second Edition, William S. Hein & Co., Buffalo, N.Y. 1996 (hereinafter "Elliot's Debates"") at 218 (History of the Jewish Theocracy), at 226 (Story of Samuel) and at 287 (Comparison to Eden). What then did the Bible tell the People about borrowing and debt? In Proverbs 22:7 they were warned, "The rich rule over the poor, and the borrower is servant to the lender." *The Holy Bible*, King James Version, Abradale Press, New York, N.Y. 1965 at 602. *See also* Genesis 14:23, *Id.* at 39; Nehemiah 5: 1-5, *Id.* at 474; Job 24:9 *Id.* at 509, Proverbs 22: 26 – 27 *Id.* at 603, Romans 13: 8, 2 Kings 4:1 *Id.* at 365. The accumulated wisdom set forth in their Bible was that debt was to be avoided lest the People and their children become slaves.

(b) The Spirit of Laws

The lessons of the Bible were reinforced in the minds of the People by a more contemporary source - Montesquieu's *Spirit of Laws* first published in 1748 and which was widely read in the Colonies. As a result Montesquieu was referred to during the Convention, in the Federalist Papers and in the minutes of the Ratifying Conventions. And what did Montesquieu advise the People about debt?

> *Of the Cruelty of Laws in respect to Debtors in a Republic.* Great is the superiority which one fellow-subject has already over another, by lending him money, which the latter borrows in order to spend, and, of course, has no longer in his possession. What must be the consequence if the laws of a republic make a further addition to this servitude and subjection?
>
> At Athens and Rome it was at first permitted to sell such debtors as were insolvent. Solon redressed this abuse at Athens by ordaining that no man's body should answer for his civil debts. But the decemvirs did not reform the same custom at Rome; and though they had Solon's regulation before their eyes, yet they did not choose to follow it. This is not the only passage of the law of the Twelve Tables in which the decemvirs show their design of checking the spirit of democracy. *The Spirit of Laws*, 2 Vols, Baron de Montesquieau, J.V. Pritchard, ed., Fred B.

Rothman & Co., Littleton, Co. 1991 at Vol. I, Book XII, Chapter 21, p. 215.

Thus Montesquieu reinforced the Biblical warnings about avoiding debt. But these stories concerned personal debt. What about public debt? Montesquieu discussed this subject in Book XXII, Chapter 17.

> *Of Public Debts.* Some have imagined that it was for the advantage of a state to be indebted to itself: they thought that this multiplied riches by increasing the circulation.
>
> Those who are of this opinion have, I believe, confounded a circulating paper which represents money, or a circulating paper which is the sign of the profits that a company has or will make by commerce, with a paper which represents a debt. The first two are extremely advantageous to the state: the last can never be so; and all that we can expect from it is that individuals have a good security from the government for their money. But let us see the inconveniences which result from it.
>
> 1. If foreigners possess much paper which represents a debt, they annually draw out of the nation a considerable sum for interest.
>
> 2. In a nation that is thus perpetually in debt, the exchange must be very low.

> 3. The taxes raised for the payment of the interest of the debt are an injury to the manufactures, by raising the price of the artificer's labour.
>
> 4. It takes the true revenue of the state from those who have activity and industry, to convey it to the indolent; that is, it gives facilities for labour to those who do not work, and clogs with difficulties those who do work.
>
> These are its inconveniences: I know of no advantages. *Id.* Vol. 2, p. 71.

(c) Commentaries on the Laws of England

William Blackstone's *Commentaries on the Laws of England* was also widely read in the Colonies. Blackstone described the impact of the public debt on England.

> Thus much is indisputably certain, that the present magnitude of our national incumbrances very far exceeds all calculations of commercial benefit, and is productive of the greatest inconveniences. For, first, the enormous taxes, that are raised upon the necessaries of life for the payment of the interest of this debt, are a hurt both to trade and manufactures, by raising the price as well of the artificer's subsistence, as of the raw material, and of course, in a much greater proportion, the price of the commodity itself.

> Secondly, if part of this debt be owing to foreigners, either they draw out of the kingdom annually a considerable quantity of specie for the interest; or else it is made an argument to grant them unreasonable privileges in order to induce them to reside here. Thirdly, if the whole be owing to subjects only, it is then charging the active and industrious subject, who pays his share of the taxes to maintain the indolent and idle creditor who receives them. William Blackstone, *Commentaries on the Laws of England by William Blackstone*, Thomas M. Cooley, ed., Callaghan and Co., Chicago, 1899, Book 1, Chap. 8 at 328..

Combined with the teachings of the Bible, Montesquieu and Blackstone the People had the experience of the crushing debt remaining from the fight for independence. The People considered this debt to be a stain on the new nation's honor. As Alexander Hamilton stated in Federalist No. 15:

> We may indeed with propriety be said to have reached almost the last stage of national humiliation. There is scarcely anything that can wound the pride or degrade the character of an independent nation which we do not experience. Are there engagements to the performance of which we are held by every tie respectable among men? These are the subjects of constant and unblushing violation. Do we owe debts to foreigners and to

> our own citizens contracted in a time of imminent peril for the preservation of our political existence? These remain without any proper or satisfactory provision for their discharge. *The Federalist on the New Constitution*, Hallowell: Masters, Smith & Company, 1852, No. 15 at 66.

Another problem was the use of the words "general Welfare". When the Convention assembled in Philadelphia in 1787, the term general Welfare was used in the Virginia Plan introduced by Governor Randolph on May 29th. *Farrand, supra.*, at 224. Still, no one was quite sure what the term "general welfare" meant and it was in and out of the text of the Constitution several times between August 22nd and August 25th when it was restored to the text and survived until ratification. Even after ratification, no one was quite sure what "general Welfare" meant.

> One interpretation is that it gives Congress broad power to legislate in the public interest. Such view is inconsistent with the concept of a limited constitution, however. A second view, promoted by Alexander Hamilton, suggested that Congress's power to tax and spend for the general welfare was additional to its other powers. A third view, represented by Thomas Jefferson and James Madison, argued that the phrase was simply a summary or general description of the specific powers and that it gave Congress no

> additional power. General Welfare, *The Oxford Guide to the Supreme Court*, 1st Ed., Kermit L. Hall, ed., Oxford University Press, New York, 2005.

The thought that the People who were being asked to ratify the Constitution would give a blank check to the new government to borrow under cl. 2 to spend under cl. 1 including spending for the general Welfare, a phrase no one quite knew what it meant, is a non-starter. It did not happen.

B. Madison and Hamilton Assured the People That Borrowing Would be Restricted to National Defense in the Federalist Papers

Given the known reluctance of the People to give the new Nation the power to Borrow, why did the Framers insist on including a Borrowing power in cl. 2? On December 28, 1787 in the *New York Packet* Hamilton in Federalist 30 set forth the reason for including Borrowing power in the Constitution.

> Let us attend to what would be the effects of this situation in the very first war in which we should happen to be engaged. We will presume, for argument's sake, that the revenue arising from the impost duties answers the purposes of a provision for the public debt and of a peace establishment for the Union. Thus circumstanced, a war breaks out. What would be the probable conduct of

> the government in such an emergency? Taught by experience that proper dependence could not be placed on the success of requisitions, unable by its own authority to lay hold of fresh resources, and urged by considerations of national danger, would it not be driven to the expedient of diverting the funds already appropriated from their proper objects to the defense of the State? It is not easy to see how a step of this kind could be avoided; and if it should be taken, it is evident that it would prove the destruction of public credit at the very moment that it was becoming essential to the public safety. To imagine that at such a crisis credit might be dispensed with, would be the extreme of infatuation. In the modern system of war, nations the most wealthy are obliged to have recourse to large loans. A country so little opulent as ours must feel this necessity in a much stronger degree. The Federalist, supra, No. 30 at 134-35.

On January 10, 1788 Robert Yates, leader of the Anti-Federalist writing under the name Brutus published Brutus No. 8 urging the defeat of the new Constitution. In Brutus No. 8 Yates stated:

> The next powers vested by this constitution in the general government, which we shall consider, are those, which authorizes them to "borrow money on the credit of the United States, and to raise and support armies." I take these two together and connect

them with the power to lay and collect taxes, duties, imposts and excises, because their extent, and the danger that will arise from the exercise of these powers, cannot be fully understood, unless they are viewed in relation to each other.

The power to borrow money is general and unlimited, and the clause so often before referred to, authorizes the passing any laws proper and necessary to carry this into execution. Under this authority, the Congress may mortgage any or all the revenues of the union, as a fund to loan money upon, and it is probably, in this way, they may borrow of foreign nations, a principal sum, the interest of which will be equal to the annual revenues of the country. — By this means, they may create a national debt, so large, as to exceed the ability of the country ever to sink. I can scarcely contemplate a greater calamity that could befall this country, than to be loaded with a debt exceeding their ability ever to discharge. If this be a just remark, it is unwise and improvident to vest in the general government a power to borrow at discretion, without any limitation or restriction. Constitution.org/afp/brutus08.htm

On January19, 1788 in the *Independent Journal* Madison responded to the attack by Yates by directly linking the Borrowing power to security from foreign danger. In Federalist 41, Madison stated:

> That we may form a correct judgment on this subject, it will be proper to review the several powers conferred on the government of the Union; and that this may be the more conveniently done they may be reduced into different classes as they relate to the following different objects: 1. Security against foreign danger; 2. Regulation of the intercourse with foreign nations; 3. Maintenance of harmony and proper intercourse among the States; 4. Certain miscellaneous objects of general utility; 5. Restraint of the States from certain injurious acts; 6. Provisions for giving due efficacy to all these powers.
>
> The powers falling within the *first* class are those of declaring war and granting letters of marque; of providing armies and fleets; of regulating and calling forth the militia; of levying and borrowing money. The Federalist, supra, No. 41 at 186.

The debate over the Borrowing power continued in the ratifying Conventions. When the New York Convention assembled in Poughkeepsie, New York on June 17, 1788, it gave the two Giants, Robert Yates and Alexander Hamilton, the opportunity to go face to face in the fight for ratification of the Constitution and the Borrowing clause was on the agenda. The Anti-Federalists attacked first proposing that New York require cl. 1 and cl. 2 be deleted and the following amendment substituted:

> *Resolved*, That no excise shall be imposed on any article of the growth or manufacture of the United States, or any part of them; and that Congress do not lay direct taxes, but when moneys arising from the impost and excise are insufficient for the public exigencies; nor then, until Congress shall first have made a requisition upon the states, to assess, levy, and pay their respective proportion of such requisition, agreeably to the census fixed in the said Constitution, in such way and manner as the legislatures of the respective states shall judge best; and in such case, if any state shall neglect or refuse to pay its proportion, pursuant to such requisition, then Congress may assess and levy such state's proportion, together with interest thereon, at the rate of six per cent. per annum, from the time of payment prescribed in such requisition Elliot's Debates, supra., at 331-32.

Thus the Anti-federalists wanted to both limit the taxing power and eliminate completely the power to borrow. Mr. Smith, an Anti-federalist, stated, "If I calculate right, the requisitions for the ten years past years amounted to thirty-six millions of dollars; of which twenty-four millions, or two thirds, have been actually paid." *Id.* at 336. Robert Livingston was the first to rise to argue against the change:

> I imagine, sir, that *indirect taxes* will be generally sufficient in time of peace. But a constitution should be calculated for all

> circumstances — for the most critical and dangerous conjunctures. Let us suppose a sudden emergency, in which the ordinary resources are entirely inadequate to the public wants, and see what difficulties present themselves on the gentleman's plan. First, a requisition is to go out to all the states. It is by no means probable that half their legislatures will be in session; perhaps none of them. In the next place, they must be convened solely to consider the requisition. When assembled, some may agree to it; some may totally refuse; others may be dilatory, and contrive plausible excuses for delay. This is an exact picture of the proceedings on this subject which have taken place for a number of years. While these complicated and lingering operations are going on, the crisis may be passed, and the Union may be thrown into embarrassments, or involved in ruin...I presume the impost and excise will not be more than sufficient to fund the debts we now owe. If future wars should lead us into extraordinary expenses, it will be necessary not only to lay direct taxes, but to procure new loans, to support those expenses. *Id.* at 343-44.

Hamilton then rose to once again emphasize the importance of borrowing to the national defense:

> Let any one compare the expense of supporting the civil list in a state with the expense of providing for the defence of the

Union. The difference is almost beyond calculation. The experience of Great Britain will throw some light on this subject. In that kingdom, the ordinary expenses of peace to those of war are as one to fourteen. But there they have a monarch, with his splendid court, and an enormous civil establishment, with which we have nothing in this country to compare. If, in Great Britain, the expenses of war and peace are so disproportioned, how wide will be their disparity in the United States! How infinitely wider between the general government and each individual state! Now, sir, where ought the great resources to be lodged? Every rational man will give an immediate answer. To what extent shall these resources be possessed? Reason says, as far as possible exigencies can require; that is, without limitation. A constitution cannot set bounds to a nation's wants; it ought not, therefore, to set bounds to its resources. Unexpected invasions, long and ruinous wars, may demand all the possible abilities of the country. Shall not your government have power to call these abilities into action? The contingencies of society are not reducible to calculations. They cannot be fixed or bounded, even in imagination. Will you limit the means of your defence, when you cannot ascertain the force or extent of the invasion? Even in ordinary wars, a government is frequently

> obliged to call for *supplies*, to the temporary oppression of the people. *Id.* at 350-51.

National emergencies and defense against foreign danger — these were the justifications for borrowing offered by the supporters of the new Constitution in The Federalist Papers and at the conventions.

C. The Framers Specifically Constructed the Tax and Spend Clause to Allay the Fears of The People That Borrowed Funds Would be Disbursed under cl. 1.

At the Convention there was never any question that borrowed funds would only be used for national emergencies or in time of war. The task for the Framers was to convince the People who were to ratify the Constitution that the borrowing power would not be used for disbursements under cl. 1. They began to lay the foundation for their argument by structurally changing the spending and borrowing provisions in the new Constitution from the provisions contained in the Articles of Confederation. In the Articles, the provision for taxing and spending was contained in Sec. VIII:

> VIII. All charges of war, and all other expenses that shall be incurred for the common defense or general welfare, and allowed by the United States in Congress assembled, shall be defrayed out of a common treasury, which shall be supplied by the several States in proportion to the value of all

> land within each State, granted or surveyed for any person, as such land and the buildings and improvements thereon shall be estimated according to such mode as the United States in Congress assembled, shall from time to time direct and appoint.
>
> The taxes for paying that proportion shall be laid and levied by the authority and direction of the legislatures of the several States within the time agreed upon by the United States in Congress assembled. usconstitution.net/articles.html

On June 15, 1787 William Patterson, delegate from New Jersey, presented the Convention what became known as the Patterson Plan. In it Patterson proposed keeping the Articles as is except for a few revisions to correct some of the ills discovered during the War. In his Plan Patterson did not suggest any revisions to Sec. VIII. Therefore it can be said the Framers considered keeping Sec. VIII intact but then rejected it.

First they separated "All charges for war" from "all other expenses that shall be incurred for the common defense or general welfare." In the new Constitution cl. 1 addressed spending for common Defense and general Welfare but makes no mention of charges for war. More importantly, in the new Constitution the words, "shall be defrayed out of a common treasury" were removed. Spending for payment of Debts, the common Defense (the standing

Army and Navy under Article I, Sec. 8, cls. 12 & 13) and general Welfare was hard wired to funds raised by taxes, imposts and duties. There would be no charge against the "common treasury" for expenses related to the common Defense and general Welfare.

Having limited spending on the common Defense and general Welfare to funds raised by taxes, imposts and duties, the Framers then built a firewall between spending and borrowing by (1) separating the spending power in cl. 1 from borrowing in cl.2, (2) including no spending provision in cl. 2 and (3) further limiting the borrowing power from what it had been under the Articles.

> Under the Articles, the borrowing power was contained in Article IX which empowered Congress, "to borrow money, or emit bills on the credit of the United States, transmitting every half-year to the respective States an account of the sums of money so borrowed or emitted." Here the Framers made the borrowing power in the new Constitution more restrictive than it had been under the Articles by striking out the words, "or emit bills". See Farrand, supra. Vol. II at 308 – 310.

These changes between the Articles and the Constitution were neither oversights nor mistakes. The Delegates knew exactly what the Articles had provided and how those provisions were being changed.

Even after ratification and even with the limitation on borrowing to national defense, many still opposed the provision including Thomas Jefferson.

> I wish it were possible to obtain a single amendment to our Constitution. I would be willing to depend on that alone for the reduction of the administration of our government to the genuine principles of its constitution: I meant an additional Article, taking from the federal government the power of borrowing.... I know that to pay all proper expenses within the year, would, in case of war, be hard on us, But not so hard as ten wars instead of one. For wars would be reduced in that proportion; besides that the State governments would be free to lend their credit in borrowing quotas. Letter to John Taylor, Montecello, November 26, 1798, *The Writings of Thomas Jefferson: being his autobiography, correspondence, reports, messages, addresses, and other writings, official and private*, Thomas Jefferson, H.A. Washington, H.W. Darby Publisher, New York, 1861, Vol. 4 at 260.

If it was understood that cl. 2 borrowing was only for national defense, why was that not stated more specifically in the clause? Because the Framers knew that with war clouds on the horizon it would be best to prepare for war and not wait to be attacked.

President Washington expressed this in his Farewell Address:

> As a very important source of strength and security, cherish public credit. One method of preserving it is, to use it as sparingly as possible; avoiding occasions of expense by cultivating peace, but remembering also that timely disbursements to prepare for danger frequently prevent much greater disbursements to repel it; President Washington's Farewell Address, Par. 30, earlyamerica.com/earlyamerica/milestones/farewell/text.html.

In the minds of the Founding Fathers, the Framers, Madison, Hamilton and the People who ratified the Constitution, borrowing under cl.2 was limited to national defense. Spending for the common Defense and general Welfare was limited to the amounts raised by taxes, imposts and duties. Was the Louisiana Purchase a valid use of cl. 2 borrowing? Yes, by denying the lands to European powers Jefferson was securing the Western Frontier. Was the military buildup under President Reagan a valid use of cl. 2 borrowing? Yes, it was entirely consistent with President Washington's admonition in his Farewell Address that preparation for war would be the best defense. Is the funding for the military activities in Iraq and Afghanistan through supplemental appropriations a constitutional use of the cl. 2 borrowing power? Yes although those campaigns may remind us of the foresight of Thomas

Jefferson and his concern over the use of cl.2 borrowing for what we now call "wars of choice".

There is no question that use of cl. 2 to borrow money or issue Federal Reserve Notes in time of war is constitutional. *The Legal Tender Cases*, 79 U.S. 457 (1870); *Hepburn v. Griswold*, 75 U.S. 603 (1870). There is *dicta* in several opinions of this Court that funds borrowed under cl. 2 could be used for any purpose. *See Perry v. United States*, 294 U.S. 330, 353 (1935); *New York ex rel. Bank of Commerce v. New York City*, 67 U.S. (2 Black) 620, 634 (1862); *Julliard v. Greenman*, 110 U.S. 421, 444 (1884). However, in each of these cases the debt or printed money involved in the controversy had been issued in connection with a war. The Petitioner is not challenging the use of cl. 2 borrowing in time of war or peril. What the Budget for FY 2010 (and now FY 2011) attempts to do is use massive borrowing under cl. 2 for spending under cl. 1 that is totally unrelated to any national emergency or defense against a foreign power. This is exactly what the Framers of the Constitution and the People who ratified the Constitution sought to prevent by building a firewall between spending under cl. 1 and borrowing under cl. 2. The Obama Administration and the 111th Congress destroyed the firewall between cl. 1 and cl. 2 and essentially reestablished the Tax and Spend provision as it had existed under the Articles. What the Nation has as a result is Robert Yates' nightmare set out in Brutus No. 8 on steroids.

2. This Court Must Act to Prevent the Government From Exceeding its Limited Powers

Article V of the Articles of Confederation provided that:

> Article V. For the most convenient management of the general interests of the united States, delegates shall be annually appointed in such a manner as the legislatures of each state shall direct, to meet in Congress on the first Monday in November, in every year, with a power reserved to each state to recall its delegates, or any of them, at any time within the year, and to send others in their stead for the remainder of the year. usconstitution.net/articles.html.

This right of Recall was very important to the People but it was not carried forward in the new Constitution. This was because the Senate was intended to be a check on the House. Senators having longer terms would be more deliberative than the members of the House and take a longer view. To permit Recall of Senators by the People who elected the members of the House would remove this important check. See Elliot's Debates, supra., Vol. II, 301-303 (Hamilton at New York Convention explaining why Recall would undo the balance between the legislative houses). The elimination of the right of Recall was seized upon by the Anti-Federalists as a reason to reject the Constitution.

See Brutus No. 16 (April 10, 1788). Madison and Hamilton knew that to win ratification the Federalist had to offer a substitute for Recall. Col. Hamilton did exactly that on June 14, 1788 when he responded to Brutus No. 16 in Federalist 78:

> The complete independence of the courts of justice is peculiarly essential in a limited Constitution. By a limited Constitution, I understand one which contains certain specified exceptions to the legislative authority; such, for instance, as that it shall pass no bills of attainder, no *ex post facto* laws, and the like. Limitations of this kind can be preserved in practice no other way than through the medium of courts of justice, whose duty it must be to declare all acts contrary to the manifest tenor of the Constitution void. Without this, all the reservations of particular rights or privileges would amount to nothing. The Federalist, supra. No. 78 at 356 - 57.

By June, 1789 eleven of the states had adopted the Constitution but Rhode Island and North Carolina had rejected it. In some states the ratification vote had been razor thin. Even in those where the vote was unanimous in favor of ratification, a large segment of the population still resisted embracing the new Constitution. *Founding America, Documents from the Revolution to the Bill of Rights*, Jack N. Rakove, ed., Barnes & Noble Classics, New York (2006), p. 623-24. In order to win over the remaining states and gain the support of the People as a whole, on June 8, 1789 Mr. Madison,

then a member of the new House of Representatives, rose to propose what would later become the Bill of Rights.

> It has been said that it is unnecessary to load the Constitution with this provision [a Bill of Rights], because it was not found effectual in the constitution of the particular States. It is true, there are a few particular States in which some of the most valuable articles have not, at one time or other, been violated; but it does not follow but they may have, to a certain degree, a salutary effect against the abuse of power. If they are incorporated into the Constitution, independent tribunals of justice will consider themselves in a peculiar manner the guardians of those rights; they will be an impenetrable bulwark against every assumption of power in the Legislative or Executive; they will be naturally led to resist every encroachment upon rights expressly stipulated for in the Constitution by the declaration of rights. 1 Annals of Cong. 439 (1789).

In *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803) (Marshall, C.J.) the Supreme Court picked up on this theme.

> It is emphatically the province and duty of the judicial department to say what the law is. Those who apply the rule to particular

> cases, must of necessity expound and interpret that rule. If two laws conflict with each other, the courts must decide on the operation of each. So if a law be in opposition to the constitution: if both the law and the constitution apply to a particular case, so that the court must either decide that case conformably to the law, disregarding the constitution; or conformably to the constitution, disregarding the law: the court must determine which of these conflicting rules governs the case. This is of the very essence of judicial duty. *Id.* at 177 – 178.

This Court enlarged on this very theme in *McCulloch v. Maryland*, 17 U.S. 316 (1819) (Marshall, C.J.).

> Should Congress, in the execution of its powers, adopt means which are prohibited by the Constitution, or should Congress, under the pretext of executing its powers, pass laws for the accomplishment of objects not intrusted to the government, it would become the painful duty of this tribunal, should a case requiring such a decision come before it, to say that such an act is not the law of the land. *Id.* at 423

Col. Hamilton in Federalist 78 recognized that if the government attempted to exceed its enumerated powers, the courts would be the only means by which the government could be contained.

Mr. Madison in introducing what became the First Amendment to the Constitution promised that if the new government attempted to exceed its enumerated powers, the courts would be available to confine the government to its enumerated powers. Chief Judge Marshall confirmed this role for this Court in his opinions. If this Court is to be true to the promise of Mr. Madison, Col. Hamilton and Chief Justice Marshall then there must be a path to this Court and the courts below for citizens to enforce the enumerated power restrictions.

3. The Opinions Below are of Little Assistance to This Court.

In the district court the Petitioner was never able to file any documents or briefs supporting his claim of standing or on the merits. Chief Judge Preska dismissed the complaint *sua sponte* citing *Lujan v. Defenders of Wildlife*, 504 U.S. 555 (1992).

The Court of Appeals implicitly rejected the rationale of the district court. Instead the Circuit Court reasoned:

> The Government moves for summary affirmance of the district court's order dismissing the Appellant's complaint for failure to state a claim on which relief may be granted pursuant to 29 U.S.C. Sec. 1915(e)(2)(B)(ii). Upon due consideration, it is hereby ORDERED that the government's motion is GRANTED, and the judgment is

> AFFIRMED because the appeal is without a basis in law or fact. (citing this Court's opinion in *Neitzke v. Williams*, 490 U.S. 319, 325 (1989).

The problem is that neither the district court nor the Government relied upon 29 U.S.C. Sec. 1915 to support dismissal. That section does not appear in the Government's Brief. Therefore, the Petitioner never addressed the applicability of Sec. 1915. That section is designed for in *forma pauperis* complaints filed by prisoners claiming constitutional violations in connection with their incarceration. The appeal below was a fully paid appeal, the Petitioner is not a prisoner and this case has nothing to do with prison confinement. Finally, Petitioner would have argued that *Neitzke* stands for the opposite proposition, namely, that just because a complaint is unlikely to withstand a Rule 12(b)(6) challenge is no basis for dismissal under Sec. 1915(e)(2)(B)(ii).

4. The Petitioner has Standing to Bring this Action

In *Schlesinger v. Reservists to Stop the War*, 418 U.S. 208 (1974) the Court took up the issue of whether a citizen could sue on behalf of the class of all citizens to prevent the government from violating a specific constitutional restriction. In that case this Court stated:

> To have standing to sue as a class representative it is essential that a plaintiff must be a part of that class, that is, he must

> possess the same interest and suffer the same injury shared by all members of the class he represents. In granting respondents standing to sue as representatives of the class of all United States citizens, the District Court therefore necessarily – and correctly – characterized respondents' interest as "undifferentiated" from that of all other citizens. *Id.* at 216 – 217.

Thus the Court opened the door to citizens suing as a representative of the class of all United States citizens and, in the appropriate case, they could have standing. The Plaintiffs in *Reservists to Stop the War* were denied standing because the injury was speculative. As the Court stated:

> The very language of respondents' complaint, supra, at 212, reveals that it is nothing more than a matter of speculation whether the claimed nonobservance of that Clause deprives citizens of the faithful discharge of the legislative duties of reservist Members of Congress. *Id.*

Later the Court reiterated the reason for the denial of standing, "[t]he District Court acknowledged that any injury resulting from the reservist status of Members of Congress was hypothetical." *Id.* at 224. Thus standing was denied not because the citizens were suing as representatives of the class of all citizens but because the injury was hypothetical.

On July 28, 2010 the C.B.O. issued an economic and budget issue brief entitled Federal Debt and the Risk of a Fiscal Crisis. In that brief the C.B.O. states:

> Although deficits during or shortly after a recession generally hasten economic recovery, persistent deficits and continually mounting debt would have several negative economic consequences for the United States. Some of those consequences would arise gradually: A growing portion of people's savings would go to purchase government debt rather than toward investments in productive capital goods such as factories and computers; that "crowding out" of investment would lead to lower output and incomes than would otherwise occur. In addition, if the payment of interest on the extra debt was financed by imposing higher marginal tax rates, those rates would discourage work and saving and further reduce output. Rising interest costs might also force reductions in spending on important government programs. Moreover, rising debt would increasingly restrict the ability of policymakers to use fiscal policy to respond to unexpected challenges, such as economic downturns or international crises.
>
> Beyond those gradual consequences, a growing level of federal debt would also increase the probability of a sudden fiscal

> crisis, during which investors would lose confidence in the government's ability to manage its budget, and the government would thereby lose its ability to borrow at affordable rates. It is possible that interest rates would rise gradually as investors' confidence declined, giving legislators advance warning of the worsening situation and sufficient time to make policy choices that could avert a crisis. But as other countries' experiences show, it is also possible that investors would lose confidence abruptly and interest rates on government debt would rise sharply. The exact point at which such a crisis might occur for the United States is unknown, in part because the ratio of federal debt to GDP is climbing into unfamiliar territory and in part because the risk of a crisis is influenced by a number of other factors, including the government's long-term budget outlook, its near-term borrowing needs, and the health of the economy. When fiscal crises do occur, they often happen during an economic downturn, which amplifies the difficulties of adjusting fiscal policy in response. *Id.* at 1.

Every financial expert agrees that the current deficit spending is not "sustainable". At the end of the road is national bankruptcy, loss of the value of the dollar, inflation, huge debt repayment expenses and ultimately a loss of liberty. We are not talking 2050; we are talking 2015. Must the Petitioner wait for riots in the streets of Los Angeles and New York

before coming to this Court for relief? And like passengers on the Titanic, whether citizens are rich or poor, when the tide of red ink sweeps over the United States everyone will drown in it.

5. Reasons for Granting the Writ

Justice Douglas wrote in *Reservists Against the War* as follows:

> We tend to overlook the basic political and legal reality that the people, not the bureaucracy, are the sovereign. Our Federal Government was created for the security and happiness of the people. Executives, lawmakers, and members of the Judiciary are inferior in the sense that they are in office only to carry out and execute the constitutional regime.
>
> The Preamble of the Constitution states that "We the People" ordained and established the Constitution.
>
> The Declaration of Independence stated that to insure "certain unalienable Rights," "Governments are instituted among Men, deriving their just powers from the consent of the governed" and "That whenever any Form of Government becomes destructive of these ends, it is the Right of the People to alter or to abolish it."

> The present case does not involve a restructuring of society - a procedure left to legislative action in part but mostly to constitutional conventions. All that the citizens in this case seek is to have the Constitution enforced as it is written. *Id.* at 232-233 (Douglas, J. dissenting)

The security and the happiness of the People has been put at risk by the unconstitutional use of borrowed funds to fund the bureaucracy and general Welfare in a massive and unprecedented way. As Col. Hamilton suggested in Federalist 78, only the courts can protect the People in this instance. That is why the Petitioner has come to this Court for protection.

CONCLUSION

The decisions of the courts below should be reversed and the case remanded for further proceedings.

Respectfully submitted,
Robert A. Heghmann
Petitioner Pro Se

S.D.N.Y. - N.Y.C.
10-cv-2523
Preska, C.J.

UNITED STATES COURT OF APPEALS
for the
SECOND CIRCUIT

_____X

At a stated term of the United States Court of Appeals for the Second Circuit, held at the Daniel Patrick Moynihan Courthouse, 500 Pearl Street, in the City of New York, on the 28th day of October, two thousand ten,

Present:
Joseph M. McLaughlin,
Robert A. Katzmann,
Peter W. Hall,
Circuit Judges.

_____X

Robert A. Heghmann, individually and on behalf of all others similarly situated,
Plaintiff-Appellant,
v. 10-1689-cv
Timothy Geithner, et al.
Defendants-Appellee.

_____X

Appellant moves for expedited consideration of the appeal. The Government moves for summary affirmance of the district court's order dismissing

Appellant's complaint for failure to state a claim on which relief may be granted pursuant to 29 U.S.C. Sec. 1915(e)(2)(B)(ii). Upon due consideration, it is hereby ORDERED that the Government's motion is GRANTED, and the judgment is AFFIRMED because the appeal is without a basis in law or fact. *See United States v. Davis*, 598 f. 3d 10, 13 (2d Cir. 2010); *Neitzke v. Williams*, 490 U.S. 319, 325 (1989)(explaining that when an action is without a basis in law or fact). Additionally, it is further ORDERED that the request for expedited consideration is DENIED as moot.

FOR THE COURT:

Catherine O'Hagen Wolfe, Clerk

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK 10 CIV 2523

ROBERT A. HEGHMANN, :
individually and on behalf of
all others similarly situated, : ORDER OF DISMISSAL

Plaintiff, :

- against - :

TIMOTHY F. GEITHNER, Secretary, :
Department of the Treasury, and BEN
S. BERNAKE, Chairman of the :
Federal Reserve Band,
:
Defendants.

Plaintiff, proceeding *pro se*, alleges that the federal budget for the United States for the fiscal year 2010 is unconstitutional and seeks permanently to enjoin defendants from enforcing or executing the budget. Complaint at 8-9. [fn. 1] Plaintiff has paid the filing fee for this matter. For the reasons set forth below, the complaint is dismissed.

1. This Court's pro see office received the instant complaint on January 5, 2010.

Discussion

Class Action

As an initial matter, the law does not permit a non-attorney to bring a complaint on behalf of someone else. See, e.g., Wenger v. Canastota, 146 F.3d 123 (2d Cir. 1998), see also Iannaccone v. Law, 142 F.3d 553, 558 (2d Cir. 1998)(Because *pro se* means to appear for one's self, a person may not appear on another person's behalf in the others cause.") Although plaintiff seeks to bring this action "individually and on behalf of all others similarly situated," Compl. at 1, he does not allege that he is an attorney licensed to practice law. As a non-attorney, plaintiff is only entitled to appear on his own behalf, and thus any claims he brings on behalf of others are dismissed.

Standing to sue

"The standing inquiry focuses on whether the plaintiff is the proper party to bring ... suit." Raines v. Byrd, 521 U.S. 811, 818 (1997). The party invoking jurisdiction bears the burden of establishing standing. FW/PHS Inc., v. Dallas, 493 U.S. 215, 231 (1990). In order to have standing, plaintiff must satisfy three constitutional requirements: first, plaintiff must have suffered an "injury in fact", which is an invasion of a legally protected interest which is (a) concrete and particularized, and (b) actual or imminent, not conjectural or hypothetical; second, there must be a causal connection between the injury and the conduct complained of, in other words, the

injury must be fairly traceable to the challenged action of defendant, and not the result of independent action of some third party not before the court; and third, it must be likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision. See New York Coastal P'ship, Inc. v. United States Dep't of Interior, 341 F.3d 112, 116 (2d Cir. 2003)(citing Lujan v. Defenders of Wildlife, 504 U.S. 555 (1992).

With respect to the requirement of concrete and particularized harm, the United States Supreme Court clarified that "by particularized, we mean that the injury must affect the plaintiff in a personal and individual way." Lujan, 504 U.S. at 561, n. 1. Plaintiff alleges that he is a "citizen of the United states and a Federal Taxpayer." Compl. at 1. Such allegations are insufficient to establish that plaintiff has suffered some harm from the federal budget that is personal to him as an individual rather than suffered by citizens at large. "A claim must not be a 'generalized grievance' shared in by all or a large class of citizens." See Assoc. for Molecular Pathology v. United States Patent & Trademark Office, No. 09 Civ. 4515 (RWS), 2009 WL 3614434, at *16 (S,D.N.Y. 2009)(citing Warth v. Seldin, 422 U.S. 490, 499 (1975)). Given that plaintiff's claim is a generalized grievance that shared in by all or a large class of citizens, plaintiff fails to establish a concrete and particularized harm to himself from the 2010 federal budget sufficient for standing to sue. Although Although (sic) this Court would generally permit amendment of a fee-paid complaint to cure any defects before dismissing the case *sua sponte*,

Hughes v. Albany, 76 F.3d 53 (2d Cir. 1996), the Court declines to do so here as amendment would be futile. See Fitzgerald v. First East Seventh Tenants Corp., 221 F.3d 362, 363-64 (2d Cir. 2000)(per curiam)(holding that district court may dismiss a frivolous complaint *sua sponte* even when the plaintiff has paid the required fee). Pilay v. Immigration and Naturalization Serv., 45 F.3d 14, 17 (2d Cir. 1995)(per curiam).

Conclusion

Accordingly, the instant complaint is dismissed. See 28 U.S.C. Sec. 1915(e)(2)(B)(ii). The Court further certifies pursuant to 28 U.S.C. Sec. 1915 (a)(3) that any appeal from this order would not be taken in good faith. See Coppedge v. United States, 369 U.S. 438, 444-45 (1962).

SO ORDERED
LORETTA A. PRESKA
Chief Judge
Dated: 22 Mar 2010
New York, New York